

REMARKS

Applicants have reviewed this application in light of the Final Office Action mailed May 15, 2008. Claims 1-23 are pending in this Application. Claims 1-23 were rejected. Claims 1, 10, and 17 are amended herein. Claims 2-4, 14-15, and 21 are cancelled without prejudice or disclaimer. Applicants respectfully request reconsideration and allowance of all pending Claims 1, 5-13, 16-20, and 22-23.

Rejections under 35 U.S.C. §103

Claims 1-23 were rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 6,718,486 issued to Drew Shaffer Roselli et al. ("*Roselli*") in view of U.S. Patent Application Publication No. (2003/0158940 by Kevin B. Leigh ("*Leigh*").

Applicants respectfully submit that *Roselli* and *Leigh*, whether considered alone or in combination, fail to teach all limitations of Applicants' amended claims.

For example, regarding amended Claim 1, *Roselli* and *Leigh* fail to teach at least:

- transforming a first calendar schedule associated with failing-over application processing operations into a second calendar schedule to be associated with failing-over application processing operations on the fail-over cluster node based at least on the calculated performance ratio;

- determine whether resources on the fail-over cluster node are sufficient to support both failing-over application processing operations in accordance with the second calendar schedule and any existing fail-over cluster node application processing operations;

- in response to determining that the resources of the fail-over cluster node are insufficient to support both failing-over application processing operations in accordance with the second calendar schedule and any existing fail-over cluster node application processing operations, applying a resource negotiation algorithm to the second calendar schedule associated with failing-over application processing operations;

- calculating a new second calendar schedule for the fail-over node application processing operations based on results from application of the resource negotiation algorithm, the new second calendar schedule providing a reduced operating state for at least a portion of the failing-over application processing operations; and

- implementing the new second calendar schedule on the fail-over cluster node such that the fail-over cluster node may effect failing-over application processing operations according to the new second calendar schedule.

Roselli and *Leigh* fail to teach these elements. For Examiner, the Examiner acknowledges that “*Roselli* does not specifically teach calculating a new calendar schedule for the fail-over node application processing operations based on results from application of the resource negotiation algorithm; and implementing the new calendar schedule on the fail-over node.” (Office Action, page 4, regarding previous Claims 4, 15, and 16). However, the Examiner argues:

However, since *Roselli* does teach a fault-tolerance unit that monitors the workload on each node and rescheduled jobs on a failed node accordingly, it would have been obvious to one having ordinary skill in the art to use this fault-tolerance unit to try to fit a set of jobs from a failed node to a second node and come up with a new schedule. In response to calculating that the workload would be too taxing on this second node, the fault-tolerance unit would take away some jobs from the set of jobs and redistribute to other nodes, while the remaining jobs would be scheduled into the second node as part of a new calendar schedule to be run.

(Id.). According to Federal Circuit in *KSR Int’l. Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1741 (2007): “Rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *Id.*, citing *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006). Here, the Examiner simply concludes that it would have been obvious to use *Roselli*’s fault tolerance unit to perform specific functions that are not disclosed anywhere in *Roselli*. The Examiner *articulates absolutely no reasoning* with a rational underpinning to support his conclusion. He simply states that “it would have been obvious.” This is the exact type of baseless conclusion that *KSR* prohibits.

Moreover, even if the Examiner could provide a proper legal grounds for his assertions discussed above, *Roselli* would still fail to disclose “calculating a new second calendar schedule for the fail-over node application processing operations based on results from application of the resource negotiation algorithm, the new second calendar schedule providing a reduced operating state for at least a portion of the failing-over application processing operations.” The Examiner alleges that it would be obvious in view of *Roselli* to use *Roselli*’s fault tolerance unit to “take away some jobs from the set of jobs and redistribute to other nodes, while the remaining jobs would be scheduled into the second node as part of a new calendar schedule to be run.” (Office Action, page 5)(emphasis added). This clearly

cannot be equated with calculating a new calendar schedule that “provid[es] a reduced operating state for at least a portion of the failing-over application processing operations,” as recited in amended Claim 1, as the Examiner’s allegedly obvious technique to “take away some jobs from the set of jobs and redistribute to other nodes” teaches away from providing a “reduced operating state” for application processing operations. Thus, even under the Examiner’s conclusory arguments, *Roselli* would teach away from amended Claim 1.

Leigh also fails to teach the elements of amended Claim 1 discussed above, and the Examiner has not alleged that *Leigh* does teach such elements.

For at least these reasons, amended Claim 1 is allowable over the proposed combination of *Roselli* and *Leigh*. Therefore, Applicants request reconsideration and allowance of amended Claim 1, as well as all claims that depend from amended Claim 1. In addition, for analogous reasons, Applicants request reconsideration and allowance of amended independent Claims 10 and 17, as well as all claims that depend therefrom.

CONCLUSION

Applicants appreciate the Examiner's careful review of the application. Applicants have now made an earnest effort to place this case in condition for allowance in light of the amendments and remarks set forth above. For the foregoing reasons, Applicants respectfully request reconsideration of the rejections and full allowance of pending Claims 1, 5-13, 16-20, and 22-23, as amended.

Applicants respectfully submit a Request for Continued Examination (RCE) Transmittal and authorize the Commissioner to charge \$810.00 to Deposit Account 50-2148 in order to effectuate this filing. Applicants believe there are no other fees due at this time; however, the Commissioner is hereby authorized to charge any fees necessary or credit any overpayment to Deposit Account No. 50-2148 of Baker Botts L.L.P.

If there are any matters concerning this Application that may be cleared up in a telephone conversation, please contact Applicants' attorney at 512.322.2689.

Respectfully submitted,
BAKER BOTTS L.L.P.
Attorney for Applicants



Eric M. Grabski
Reg. No. 51,749

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SEND CORRESPONDENCE TO:

BAKER BOTTS L.L.P.

CUSTOMER NO. **23640**

512.322.2689

512.322.8383 (fax)